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In the Supreme Court of the United States

OCTOBER TERM, 1947

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

ESTATE OF FRANCOIS L. CHURCH, DECEASED,
EDWARD E. BLACK, EXECUTOR

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE PETITIONER

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OPINIONS BELOW

The memorandum opinion of the Tax Court (R. 9–10) is unreported. The prevailing and dissenting opinions in the Circuit Court of Appeals (R. 17–22) are reported in 161 F. 2d 11.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on March 17, 1947. (R. 23.) The petition for a writ of certiorari was filed on May 20, 1947, and was granted on June 16, 1947. (R. 24.) The jurisdiction of this Court rests on

Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether a transfer in trust was intended to take effect in possession or enjoyment at or after the grantor's death within the meaning of Section 811 (c) of the Internal Revenue Code where the transfer was made in 1924 and the decedent retained the income for life plus a possibility of reversion by operation of law; and whether in the circumstances, the Circuit Court of Appeals had power to reverse the Tax Court's decision that the transfer was not taxable.

STATUTE AND REGULATIONS INVOLVED

These are set out in the Appendix, *infra*, pp. 8–10.

STATEMENT

The Tax Court found the following facts (R. 7–9):

The taxpayer is the Estate of Francois L. Church, who was at the time of his death, December 11, 1939, a resident of the State of New Jersey. The estate tax return was filed with the Collector of Internal Revenue for the Fifth District of New Jersey on March 10, 1941. (R. 7.)

By deed of trust, dated May 17, 1924, decedent transferred to himself, E. Dwight Church, and Charles T. Church, 1,000 shares of stock of Church & Dwight Company, in trust for the purposes and upon the terms hereinafter described.

The instrument was executed and delivered in the State of New York, in which State decedent continuously resided until he moved to New Jersey in 1937. E. Dwight Church and Charles T. Church, brothers of the half-blood of decedent, have at all times here material continually resided in the State of New York. The shares constituting the corpus of the trust and the bank account of the trust have been physically located in New York. (R. 8.)

At the time of the creation of the trust, decedent had but recently attained his twenty-first birthday, whereupon there was delivered to him property of substantial value which had theretofore been held and managed for him by his mother. The principal asset of the estate consisted of 1,000 shares of the stock of Church & Dwight Company, a corporation closely held by the Church and Dwight families. In March 1924, it came to the attention of E. Dwight Church that decedent was leading a rather riotous existence, drinking heavily, squandering his money, and associating with companions of questionable repute. Fearful that decedent, as a result of his improvidence, might dispose of the 1,000 shares of Church & Dwight stock to persons outside of the family circle, E. Dwight Church suggested to decedent that he place the stock in trust in order to safeguard it and to assure decedent an income for his life. Following this suggestion, decedent estab-

lished the trust above mentioned. The trust indenture provided that the income should be paid to decedent for life and upon his death the trust should terminate and the corpus be distributed to his issue then surviving. (R. 8). The trust instrument further provided as follows (R. 8):

> *In the event* that the Settlor should die leaving no lawful issue him surviving then and in that event the trustees are ordered and directed to transfer and pay over the principal amount of said trust estate, with all increase thereof as it shall then exist in equal shares to the brothers and sisters of the Settlor then surviving, any child or children of a deceased brother or sister to take the share per stirpes which their parent would have been entitled to receive if living.

No power to alter, amend, or revoke was reserved by the grantor. (R. 8.)

On May 17, 1924, the date of the creation of the trust, decedent had one brother and sister of the full blood and four half brothers. On that date there were living seven children of the brothers of the half blood. Decedent was then unmarried and had no children. At death he was survived by his brother of the whole blood, who had two children then living; his sister of the whole blood, who had one child then living; and his four half brothers, who had seven children then living. (R. 8–9.)

The Commissioner determined that the corpus of the trust was includible in decedent's gross estate as a transfer intended to take effect in possession or enjoyment at or after decedent's death. (R. 9.) The Tax Court overruled that determination. (R. 9–10.) The Circuit Court of Appeals, sitting *en banc*, affirmed, one judge dissenting. (R. 17–22.)

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

(1) In affirming the decision of the Tax Court.

(2) In not holding that the value of the trust property should be included in the grantor's gross estate under Section 811 (c) of the Internal Revenue Code.

ARGUMENT

This case is to be argued immediately following *Estate of Spiegel* v. *Commissioner*, No. 52, this Term. Although there are some differences in the facts, the basic questions presented here are essentially the same as the ones in the *Spiegel* case, and the decisions are in conflict as to both the taxability of the transfers and the power of the appellate courts to reverse the Tax Court.

In the instant case, the trust is construable in accordance with the law of New York, while in the *Spiegel* case the trust is construable in accordance with the law of Illinois. And in the instant case, the grantor retained the income for life, while in the *Spiegel* case, he gave it to his chil-

dren. But these points of difference do not affect the basic similarity of the two cases. In each of them, the provisions for the eventual distribution of the corpus were made dependent upon the grantor's death and nobody could obtain full dominion over the property until after he died. And here, as in the *Spiegel* case, the grantor gave the remainder to a restricted and exhaustible group of blood relatives, *if they survived him*, and made no provision for distribution of the corpus if they all predeceased him. Hence, if they had all died before him, the corpus would have reverted to him by operation of law. Restatement, Trusts (1935), Sec. 411; *Commissioner* v. *Bayne's Estate*, 155 F. 2d 475 (C. C. A. 2d); *Newton* v. *Hunt*, 134 App. Div. 325, 334, affirmed, 201 N. Y. 599; *Doctor* v. *Hughes*, 225 N. Y. 305, 309.[1] Indeed, the Tax Court in the instant case recognized that there was such a possibility. (R. 9.) Reference is here made to our brief in the *Spiegel* case which sets forth the arguments in support of our contention that transfers of this

[1] In *Central Hanover Bank & Trust Co.* v. *United States*, 58 F. Supp. 565, the Court of Claims in holding the transfer there involved without the statute expressed doubt that under New York law there would be a possibility of reversion. The court based that doubt upon decisions such as *Matter of McCombs*, 261 App. Div. 449, affirmed, 287 N. Y. 557, which do not involve *inter vivos* trusts but testamentary dispositions. Those cases are inapplicable to *inter vivos* trusts for the same reasons as given in our *Spiegel* brief with reference to the Illinois law.

character are taxable under the law and the regulations.

Our brief in the *Spiegel* case also contains our views with respect to the power of the appellate courts to reverse the decision of the Tax Court in a case like this, and for the reasons therein given, we submit that the Seventh Circuit correctly reversed the Tax Court in the *Spiegel* case and the Third Circuit wrongly upheld it in the instant one.

CONCLUSION

The decision of the Circuit Court of Appeals was incorrect and it should therefore be reversed.

Respectfully submitted.

PHILIP B. PERLMAN,
Solicitor General.
THERON LAMAR CAUDLE,
Assistant Attorney General.
ARNOLD RAUM,
LEE A. JACKSON,
L. W. POST,
Special Assistants to the Attorney General.

OCTOBER 1947.

APPENDIX

Internal Revenue Code:

> SEC. 811. GROSS ESTATE.
>
> The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated, except real property situated outside of the United States—
>
> * * * * *
>
> (c) *Transfers in contemplation of, or taking effect at death.*—To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, * * * except in case of a bona fide sale for an adequate and full consideration in money or money's worth. * * *
>
> * * * * *
>
> (26 U. S. C. 1940 ed., Sec. 811.)

Treasury Regulations 105, promulgated under the estate tax provisions of the Internal Revenue Code:

> SEC. 81.17 [as amended by T. D. 5512, 1946–1 Cum. Bull. 264]. *Transfers intended to take effect at or after the decedent's death.*—A transfer of an interest in property by the decedent during his life (other than a *bona fide* sale for an adequate and full consideration in money or money's worth) is "intended to take effect in possession or enjoyment at or after his

death," and hence the value of such property interest is includible in his gross estate, if—

(1) possession or enjoyment of the transferred interest can be obtained only by beneficiaries who must survive the decedent, and

(2) the decedent or his estate possesses any right or interest in the property (whether arising by the express terms of the instrument of transfer or otherwise).

The decedent shall not be deemed to possess a right or interest in the property if his right or interest consists solely of an estate for his life. (For regulations concerning the separate provision of the statute dealing directly with the case of a life estate retained in property transferred by the decedent, see section 81.18.) Where possession or enjoyment of the transferred interest can be obtained by beneficiaries either by surviving the decedent or through the occurrence of some other event or through the exercise of a power, subparagraph (1) shall not be considered as satisfied unless, from a consideration of the terms and circumstances of the transfer as a whole, the power or event is deemed to be unreal, in which case such event or power shall be disregarded. Except as provided in the last paragraph of this section, the value of the property so transferred is includible without regard to the date when the transfer was made, whether before or after the enactment of the Revenue Act of 1916.

* * * * *

Example (5). The decedent transferred property in trust retaining a life estate and giving a succeeding life estate to another,

with the remainder to such succeeding life tenant's issue who survived both the decedent and the life tenant. The decedent also retained the power to designate who shall take the remainder in case the succeeding life tenant died without surviving issue. Here, possession or enjoyment of the property can be obtained by the succeeding life tenant and by the succeeding life tenant's issue only if they survive the decedent; thus satisfying requirement (1). Requirement (2) is also satisfied with respect to the interests of both beneficiaries since the decedent retained a right in the entire property, i. e., a contingent power of appointment. The entire value of the property, including the value of the succeeding life estate and the remainder is, therefore, includible in the decedent's gross estate.

* * * * *

Example (7). The decedent transferred property in trust to pay the income to his son during decedent's life, and at decedent's death to pay the principal to his son if living; if not, to his son's issue surviving both the son and the decedent. In this case, the property may revert to the estate of the decedent if neither his son nor his son's issue survives him. Moreover, neither the son nor the latter's issue can obtain possession or enjoyment of the property unless they survive the decedent. The entire value of the estate in remainder is, therefore, includible in the latter's gross estate.